on behalf of themselves and all other persons producing wine in the champagne district of France which was supplied to England and Wales, claiming an injunction restraining the defendants from applying the trade descriptions "champagne" or "Spanish Champagne" to wine made in Spain or from grapes grown in Spain. For the sake of brevity, I only wish to quote paragraph (l) of the head note under "Held":

> 33A (1) that the law of pasing off was not limited in scope as to allow a person competing in trade to attach to his produce a name or description with which it had no natural association, so as to make use of the reputation and goodwill gained by a product genuinely indicated by that name and description, and that it made no difference if the persons truly entitled to describe their goods by that name were a class producing goods in a certain locality and not merely one individual, for the description was part of their goodwill and a right of property. The law would fail if, as a general rule, it could offer no remedy for the deliberate act of one person causing damage to the property of another and it should, and did, provide a remedy for the type of unfair competition alleged in the statement of claim.

The second plaintiffs are a company who carry on business as distillers, blenders and exporters of Scotch Whisky. I am of the view they clearly have a reasonable cause of action against the defendants whom they allege are passing-off their (defendants') product as Scotch Whisky when it is not. I am of the view that the statement of claim of the second plaintiff is not frivolous, vexatious or an abuse of the process of the Court.

The defendants' application (Enclosure 18) is also dismissed with costs.

WENG WAH CONSTRUCTION CO. SDN. BHD.

v.

YIK FOONG DEVELOPMENT SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' HJ. ABDUL MALEK BIN HJ. AHMAD J.
[COMPANIES WINDING-UP NO. D5-28-300-90]
7 APRIL 1994

COMPANY LAW: Section 218(2)(a) Companies Act 1965 - Winding-up petition - Preliminary objections - Respondent contending under s. 218(2)(a) proper service by leaving petition at respondent's registered office - Petition served by registered post - Whether non-compliance with statutory mode of service - Contention that petitioner digressed from s. 218(2)(a) to s. 218(2)(c) - Whether permissible - Respondent claiming to have recovered from recession - Proposal made to settle debt - Whether proposal bona fide - Whether respondent able to meet liabilities - Whether in the interest of the parties to wind-up respondent.

STATUTORY INTERPRETATION: Companies Act 1965 - Section 218(2) - Whether word "or" in paragraghs (a), (b) & (c) in sub-section (2) disjunctive or conjunctive - Effect of word.

The petition was taken out against the respondent pursuant to a judgment obtained on 22 May 1986 for RM2,284,627.94 together with interest and costs which as at 1 October 1993 had accumulated to RM4,997,623.61. The respondent was also indebted to the Director-General of Inland Revenue and Perunding Aziz Sehu Sdn Bhd and had charged all its movable property to two opposing creditors.

In opposing the petition learned Counsel for the respondent raised preliminary objections, firstly, that the petitioner was relying solely on s. 218(2)(a) of the Companies Act 1965 (the Act) in which case the proper mode of service was by leaving it at the respondent's registered office. Section 350 of the Act provided for service by way of registered post which was the mode taken by the petitioner in this case. The respondent claimed that as there was non-compliance with the statutory mode of service, there was no statutory presumption of insolvency. Secondly, the respondent contended that the petitioner had digressed from s. 218(2)(a) to

s. 218(2)(c) as well and had added new allegations not raised in the petition in their subsequent affidavits. The respondent further claimed to have recovered from the recession and informed the Court that the government was not proceeding with their winding-up petition and that a proposal to settle had been made to the petitioner. Accordingly, the respondent submitted that interest would best be served by allowing the respondent to continue functioning.

Held:

[1] With respect to the mode of service, the service by registered post in this case did not comply with the specific requirements of s. 218(2)(a) of the Act (see *South Seas Development Ltd. v. Commercial Advances Nominees Ltd*. [1976] 1 NZLR 679). The New Zealand Court of Appeal in the *South Seas* case went further to hold that proof of actual physical delivery by a postal officer of a registered letter containing such a demand at the registered office of the company could be effective service within the terms of s. 218(a) of the New Zealand Companies Act 1955 (similar to s. 218(2)(a) of the Act) as what was important was the adequate proof of physical delivery by the creditor. This was satisfied in the present case as the notice of demand by registered post was in fact actually delivered to the respondent's registered office. Accordingly, the Court overruled the first objection.

[2] Regarding the second preliminary objection that the petitioner was utilising all the provisions in s. 218(2) of the Act and not paragragh (a) alone, the Court found that this objection lacked merit as the disjunctive use of the word "or" for the three paragraghs in subsection (2) of s. 218 clearly meant that the petitioner was at liberty to proceed under any or all of them especially so when they had not specifically stated any particular paragragh in the recital of the petition. In any case this objection was of no consequence in view of the Court overruling the earlier objection and it followed that the winding-up order could be given on the basis of paragragh (a) alone.

[3] The proposal to pay RM30,000 monthly by the respondent could not be said to be either genuine or *bona fide* as it was made about three years after the petition had been served on them and only a week before the date of the hearing of the petition was originally fixed. The respondent's profits for 1993, although a good sign considering their earlier losses, was only a modest RM97,557 which would only cover three monthly payments at the rate proposed. Any possibility of a better margin in their future profits was highly speculative in the circumstances. The respondent had no assets to meet its current liabilities and were therefore commercially insolvent. They were unable to pay their debts considering that judgment was obtained against them 8 years ago. Although winding-up was to be regarded as a remedy of last resort and one which ought not to be granted if some other less drastic form of relief was available and appropriate, the Court found none here and accordingly granted the petition as prayed.

[Petition granted as prayed].

Cases referred to:

Morgan Guaranty Trust Company of New York v. Lian Seng Properties Sdn. Bhd. [1991] 1 MLJ 95 ***(refd)***

South Seas Development Ltd. v. Commercial Advances Nominees Ltd. [1976] 1 NZLR 679 ***(foll)***

Legislation referred to:

Companies Act 1965, ss. 218(2)(a), (2)(b) & 2(c), 223, 350

Companies Act 1955, ss. 218(a), 460(1) (New Zealand)

For the petitioner - Y.T. Ling; M/s. Lee, Ling & Partners

For the respondent - C.T. Tan; M/s. K.K. Chong, Chai & Koo

For the official assignee - Nor Risan

JUDGMENT

Hj. Abdul Malek bin Hj. Ahmad J:

The petitioner had taken out the petition against the respondent on 15 August 1992 based on the judgment obtained on 22 May 1986 for RM2,284,627.94 together with interest thereon at the rate of 15 per cent per annum calculated from 1 November 1985 to the date of full realisation and costs of RM458. The judgment also specifically states that there will be no stay of execution.

No payment had been made and on 17 September 1990, the petitioner had sent a notice of demand to the respondent under s. 218 of the Companies Act 1965 (hereinafter "the Act"). Despite that notice, the respondent had yet to make payment.

In their affidavit, the petitioner had stated that the respondent also owed the Director-General

of Inland Revenue RM1,755,710.02 and Perunding Aziz Sehu Sdn. Bhd. (hereinafter "PAS") RM69,000 and with their paid-up capital of RM1.8 million, it was abundantly clear that the liabilities of the respondent had exceeded their assets. For the judgment on which the petition is based alone, the petitioner had also affirmed that the sum had now become RM4,997,623.61 as at 1 October 1993 due to the accumulated interest. Apart from that, the respondent had charged all their movable properties to two of the opposing creditors namely UMBC Finance Berhad and Visia Finance Berhad (hereinafter "the chargees"). It should be pointed out that two other opposing creditors namely Kam Foong Development Sdn. Bhd. and Incorporated Organisation Sdn. Bhd. were not present at the hearing. In addition, learned Counsel for the petitioner had also asked for costs against the chargees for the earlier adjournment when they had asked for the postponement before that to reply to the affidavits but had withdrawn as opposing creditors just before this hearing.

The petitioner had alleged that the stand of the chargees was in bad faith and was an abuse of the process of Court as they had filed an originating summons No. 24-49-91 in the High Court at Ipoh after this petition was filed to seek a declaration that the realisation by way of sale, private or otherwise, transfer or assignment of the charged properties after the presentation of this petition was not avoided under s. 223 of the Act, and other consequential orders. They had also filed the notices to appear in this petition. They had then applied to have the originating summons in the Ipoh case adjudicated first whereupon this matter was adjourned *sine die*. This had caused a considerable amount of delay as the petitioner had only received from the chargees' solicitors a copy of the Ipoh order on 27 July 1993. On 20 August 1993, the chargees had sent to the petitioner a notice of discontinuance in their capacities as opposing creditors. The petition was then fixed for 26 October 1993 but on 21 October 1993 the chargees had again filed their notices of intention to oppose the petition which we know had now again been withdrawn.

In the meantime, the respondent had made proposals to pay but the petitioner's view was that the proposed sum of RM30,000 a month was not acceptable as it could not even cover the interest accrued and which was only equivalent to three monthly payments based on the amount of their 1993 profits as stated in their auditor's report. The petitioner had intimated that they would accept any payment proposals only if the monthly payment was RM200,000 payable over three years.

Learned Counsel for the respondent had in fact wanted to raise preliminary objections at the outset but I had refused to hear them then in view of the Supreme Court decision in *Morgan Guaranty Trust Company of New York v. Lian Seng Properties Sdn. Bhd.* [1991] 1 MLJ 95 which had ruled that a petitioner should not be prevented from pursuing their petition and that it should not be struck out *in limine* but should be heard on its merits so that the Court would be able to consider all the evidence and determine whether it should exercise its discretion to order a winding-up or not.

Opposing the petition, learned Counsel for the respondent had submitted that the petitioner was solely and wholly relying on s. 218(2)(a) of the Act and not on the subsequent paragraphs (2)(b) and (2)(c), in which case the service is only by leaving it at the respondent's registered office which had to be strictly complied with. This provision, he added, has to be compared with s. 350 of the Act which provides for service by sending by registered post as well which was the mode taken by the petitioner in this case. In the event, because of the non-compliance with the statutory mode of service, he was of the view that there was no statutory presumption of insolvency.

His second preliminary objection was that the petitioner had wandered beyond s. 218(2)(a) of the Act by digressing into s. 218(2)(c) as well. In addition, he said that the petitioner had added new allegations not raised in their petition in their subsequent affidavits.

As for the petition itself, learned Counsel for the respondent had told the Court that they had since recovered from the recession and there was an upward trend in their fortunes as seen from the modest profits in 1993 after the losses sustained in earlier years. He added that even the Government was not proceeding with their winding up petition against the respondent in view of the respondent's appeal to the Special Commissioners for Income Tax. He confirmed that the respondent had offered the petitioner RM30,000 monthly to settle this debt.

In the circumstances, he was of the opinion that since the petitioner is an unsecured creditor,

since the respondent had made a concrete offer to pay and since the Court's power in this matter is purely discretionary, interest would best be served by allowing the respondent to continue functioning by dismissing the petition.

In dealing with the first preliminary objection as to the mode of service, I had not had much success in locating earlier local authorities on the same point despite painstakingly perusing other cases on the mode of service. However, I was fortunate to come across a similar situation in the New Zealand Court of Appeal's decision in *South Seas Development Ltd. v. Commercial Advances Nominees Ltd.* [1976] 1 NZLR 679 which had ruled that before a demand under s. 218(a) of the New Zealand Companies Act 1955 (hereinafter "the NZ Act"), which is similar to our s. 218(2)(a), can be relied upon as a foundation of a winding-up petition, it must be established that the demand had been served on terms of the specific and special requirements of the said section, which is by leaving the notice of demand at the registered office of the respondent company. The said Court also held that the general provisions of s. 460(1) of the NZ Act in respect of service of notices, which is equivalent to our s. 350 in that it provides for the alternative mode of sending the notice of demand by registered post which was the mode adopted by the petitioner in this case, was not applicable to the service of a notice of demand under their s. 218(a).

This of course meant that service by registered post in our case did not comply with the specific requirements of s. 218(2)(a) of the Act and the preliminary objection should be sustained. However, the New Zealand Court of Appeal went further to hold that proof of actual physical delivery by a postal officer of a registered letter containing such a demand at the registered office of the company could be effective service within the terms of s. 218(a) of the NZ Act as what is important is the adequate proof of physical delivery by the creditor. This was not fulfilled on the facts of that case as the letter to the debtor in that case was only sent to their post box at the local post office and not to their registered office but it is satisfied in our situation as the notice of demand by registered post was in fact actually delivered to the respondent's registered office. The obvious underlying requirement is that there must be adequate proof of physical delivery to the respondent which has been fulfilled in our case. On that score, I had to overrule the first preliminary objection as to service.

It may be relevant to observe why there is an alternative mode of service provided under the general provisions of both the NZ Act and the Act, although it is arguable as to whether the general provisions of the law include the particular ones as the difference could have been due to either drafting oversight or misguided executive policy, but the New Zealand case had stated that the purpose of providing an alternative form of service by registered post in the general section may be to ensure that the sending of a registered letter is sufficient service irrespective of whether or not the letter is received by the addressee.

As for the second preliminary objection that the petitioner is making use of all the provisions in s. 218(2) of the Act and not paragraph (a) alone, I find that this objection certainly lacks merit as in the first place the disjunctive use of the word "or" for the three paragraphs in subsection (2) of the relevant section of the Act clearly means that the petitioner is at liberty to proceed under any or all of them especially so when they had not specifically stated any particular paragraph in the recital of the petition. In any case, for what it is worth, this objection is of no consequence in view of my overruling the earlier preliminary objection and it follows that the winding-up order may be given on the basis of paragraph (a) alone. The interesting thing to note is that it is in fact the respondent who is making use of paragraph (c) particularly to show that they are solvent by submitting their latest audited accounts and providing evidence that they had realisable assets and that their profits situation was improving.

As for the petition itself, it is supported by PAS as supporting creditor whereas two of the opposing creditors namely the chargees had filed their notice of discontinuance in the matter and the remaining two opposing creditors had not presented themselves at the hearing of the petition. It must be remembered that the judgment debt as at 1 October 1993 was RM4,997,623.61 which can be considered an astronomical figure even in today's high finance atmosphere and the proposal to pay RM30,000 monthly by the respondent cannot be said to be either genuine or *bona fide* as it had been made about three years after the petition had been served on them and only a week before the date the hearing of the

petition was originally fixed. The respondent's profits for 1993, although a good sign considering their earlier losses, was only a modest RM97,557 which would cover only three monthly payments at the rate proposed by them. Any possibility of a better margin in their future profits is highly speculative in the circumstances. At the amount proposed by the respondent, payment would take at least thirteen years. In addition, they also owe the government and PAS another RM1.8 million.

To my mind, the respondent has no assets to meet its current liabilities and therefore is commercially insolvent. It is more than obvious that they are unable to pay their debts especially considering the fact that the judgment against them was granted almost eight years ago. Although winding-up is to be regarded as a remedy of last resort and one which ought not to be granted if some other less drastic form of relief is available and appropriate, I find none here. I had accordingly granted the petition as prayed.

WILLIE SODOI

v.

PUBLIC PROSECUTOR

HIGH COURT SABAH & SARAWAK, TAWAU
TUAN IAN H.C. CHIN J.
[CRIMINAL APPEAL NO. T 14 OF 1994]
5 JULY 1994

CRIMINAL PROCEDURE: Charge - Section 380 Penal Code - Element of time - Time of commission of offence not disclosed by evidence - Whether charge proved - Whether conviction proper - CPC s. 153(i).

The appellant was convicted of an offence under s. 380 Penal Code for theft of 130 bags of cocoa beans sometime "dalam bulan Februari 1991 di antara jam 1.00 petang dan 2.00 petang". The facts showed that despite the prosecution having seemed to have proved the other ingredients of the charge, it failed to adduce any evidence at all to show just when approximately the alleged offence was committed let alone the actual time of the commission of the offence as specified in the charge. On appeal the question that arose was whether in the circumstances the appellant was properly convicted by the lower Court.

Held:

[1] Since a charge requires the date of the alleged commission of the offence to be stated, the evidence that go towards supporting the charge should likewise establish the approximate date in which the offence was committed. In this case the time in which the offence was alleged to have been committed was not proven at all let alone establishing a reasonable proximate period. The evidence tendered by the prosecution are not specific and accurate enough as to even require the accused to enter upon his defence.

[Conviction set aside. Accused acquitted and discharged].

Cases referred to:
Re Lim Yong Eng [1956] MLJ 79
R. v. Hartley [1972] 2 QB 1, CA

Legislation referred to:
Criminal Procedure Code, s. 153(i)

For the accused - C.C. Liew; M/s. C.C. Liew & Co.
For the public prosecutor - Zahir Hussein B. Ahmad Shah, DPP